IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-430

GLADYS C. DOSS,
Petitioner

v.

LEWIS-GALE HOSPITAL, INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT FOR THE CITY OF ROANOKE, VIRGINIA

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The orders of the state courts are printed in the appendix to the Petition.

JURISDICTION

(1) The Petition invokes jurisdiction under 28 U.S.C. § 1257 (3). The Petition seeks certiorari to the trial court (Circuit Court for the City of Roanoke, Virginia), and not the Virginia Supreme Court. The order of the latter court, dated June 16, 1972, recites that the petition for writ of error to the lower court judgment was maturely considered and a transcript of the record inspected, and the court being of the opinion that there was no reversible error in the judgment, the same was affirmed.

(2) No federal question was raised in the court to which certiorari is sought.

(3) The first reference to a federal question came two months after the trial in Petitioner's notice of appeal to the Virginia Supreme Court. (R. 80)

RULE INVOLVED

Rule 1:8 (now Rule 5:7) of the Rules of the Supreme Court of Virginia provided as follows:

> "In civil and criminal cases, all objections to writs of every kind, pleadings, instructions, notices, the admissibility of evidence, or other matters requiring a ruling or judgment of the trial court, shall state with reasonable certainty the ground of objection, and, unless it appears from the record to have been so stated, such objections will not be considered by this court except for good cause shown, or to enable this court to attain the ends of justice."

QUESTIONS PRESENTED

I. Was a federal question timely and properly raised in the state proceedings?

II. Did the state proceedings involve a Constitutional issue?

STATEMENT

I. *Facts.* While a patient in Respondent's hospital, Petitioner underwent amputation of her leg following development of a clot below the knee. She claimed the clot resulted from an injection of medication into her buttocks negligently administered by Respondent's nurse nine days earlier. Respondent denied negligence and contended that the clot resulted from the natural progression of Petitioner's atherosclerotic disease. Both parties produced medical testimony in support of their contentions, thereby presenting clear-cut factual issues to the jury which returned a verdict in favor of the Respondent.

II. *Proceedings.* The trial commenced on a Tuesday. The evidence was concluded before 4 p.m. on the third day, Thursday. At that time the judge advised the jury that the case would be submitted for their determination following a brief recess to allow preparation of instructions. When one of the jurors inquired whether it would be late before they would receive the case, the court replied:

> "Well, I certainly hope not too late, but we might explore the possibility of how long it would take to complete the instructions and then if you will just have a recess for a few moments, we will decide. Otherwise, you will have to return on Monday morning." (Transcript of Evidence 882)

A short time thereafter, while instructions were being considered, the jury sent word that they preferred not to remain beyond 5 p.m. that day, as they had stayed late the preceding days. The court having informed counsel early in the trial that he wished to leave the city during the next morning (Friday), he then advised counsel that he would recess the case and resume the trial the following Monday. (Stipulation of Incidents of Trial) At this time, desiring to conclude the case before the weekend, counsel for both parties proposed that instruction preparation be continued by the court and counsel, and that the jury be requested to return early the

next morning when the case could be submitted promptly for their consideration. It was further proposed that an associate judge be authorized to receive the verdict in the event the presiding judge should have to leave before the jury had concluded its deliberations.

The judge agreed to the proposal reluctantly. In asking the jury to return at 8:00 a.m. the next morning, he said: "If we can do that, then we can conclude the matter tomorrow rather than continuing over until Monday, *which I would prefer doing.*" (Emphasis supplied. Transcript of Evidence 892)

After the jury had been excused and the court and counsel had completed work on instructions, the judge inquired how much time counsel desired for presentation of closing argument. Petitioner's counsel informed the court that they would like thirty minutes, and this being agreeable to Respondent's counsel, the judge so directed. Thereafter, counsel for Petitioner advised the court that they would prefer forty minutes rather than thirty minutes, and the judge granted the request. Both parties thus agreed that each side would have a total of forty minutes in which to present closing argument. (Stipulation of Incidents of Trial)

The next morning (Friday), the jury was instructed and argument presented as scheduled, and the jury retired to deliberate its verdict. At 10:45 a.m., the presiding judge (Judge Hoback) had to leave, and the parties stipulated their approval of his departure and the receipt of the verdict by another judge. At that time, Petitioner's counsel, in agreeing to the procedure, said:

"And the plaintiff likewise stipulates to that agreement to the situation, *and we also thank Judge Hoback for the pleasure of holding this case for us.*" (Emphasis supplied. Transcript of Evidence 992)

At 11:34 a.m., less than an hour following the judge's departure, the jury announced ready and returned a verdict in favor of the Respondent.

Six days after the verdict, Petitioner formally moved the trial court to set the verdict aside. The motion was denied, and the judgment of the trial court subsequently affirmed by the Virginia Supreme Court which denied petition for writ of error.

ARGUMENT

1. *Federal Question Untimely Raised.*

This Petition seeks certiorari to the trial court on the basis of an alleged federal question never presented to it.

Prior to the jury's verdict, Petitioner's counsel were entirely satisfied with the conduct of the trial. Indeed, counsel were lavish in their praise of the court's patience and kindness, and had the jury found in Petitioner's favor, the fairness of the trial would never have been questioned. As it happened, the jury found against Petitioner: Then, and only then, did her counsel suggest any impropriety in the conduct of the trial.

Petitioner now contends that she was deprived of due process as provided by the Fourteenth Amendment, a contention she never made to the trial judge. Petitioner does not even suggest that this assertion was made during the four days of trial prior to the verdict. The best she can do is to claim that she was "prepared" to raise a federal question in her motion to set the verdict aside, but a careful reading of the transcript reveals no reference to the Fourteenth Amendment or the Constitution during the one hour and ten minutes the hearing lasted. In point of fact, *the first reference to a federal question appears as the last assignment of error in Petitioner's appeal to the Virginia Supreme Court, filed more than two months after the trial.* (R. 80)

This Court has consistently refused to exercise jurisdiction where, as in the instant matter, the so-called

federal issue was not raised at the trial court level. See *Edleman* v. *California*, 344 U.S. 357, 97 L. ed. 387, 73 S. Ct. 293 (1953); *Hulbert* v. *Chicago*, 202 U.S. 275, 50 L. ed. 1026, 26 S. Ct. 617 (1906). It is also elemental that in raising a federal question a party must observe state procedural requirements. If these are not followed, this Court will refuse jurisdiction both where the highest state court declines to pass upon the question for the procedural reason (*Pennsylvania R. Co.* v. *Illinois Brick Co.*, 297 U.S. 447, 80 L. ed. 796, 56 S. Ct. 556 (1936) and where the highest state court is silent on the question. (*Mutual Life Insurance Company* v. *McGrew*, 188 U.S. 291, 47 L. ed. 480, 23 S. Ct. 375 (1903).

The Virginia procedure was explicit in requiring statement of objections in the trial court to allow it an opportunity to correct any deficiencies. Notwithstanding this logical requirement, the complaints made in the Petition were never stated to the trial judge before the verdict.

Petitioner was advised early of the judge's anticipated absence. Contrary to insinuations in the Petition, he made it clear to all counsel that his absence was not an absolute necessity, and that his schedule would be adjusted if there should be any question as to its effect upon the trial. The judge was receptive to any objections counsel might have, but was given no cause to think any existed. Notwithstanding full opportunity to do so, Petitioner's counsel made no complaint, and showed no displeasure. If counsel had anxiety about the trial, it failed to manifest itself until several days after the verdict.

The first hint given to the judge of any dissatisfaction by Petitioner's counsel came in the hearing to set the verdict aside, and even then counsel acknowledged failure of a timely objection. Following a lengthy recital of events, this exchange occurred between the judge and Petitioner's counsel:

"THE COURT: Before you get to the law, let's get to the facts and I want the record to be replete

with full information, not only that the Court offered to continue the case to the following week —

MR. ANDERSON: Thank you, sir.

THE COURT: *but also to curtail any trip that the Court had in mind on Friday, and was urged by counsel not to do so.*

MR. ANDERSON: *That is entirely right. . . .*"

(Emphasis supplied. Transcript of Motion for New Trial 8)

II. *No Constitutional Issue*

Petitioner cannot deny that she was provided adequate time to present her case. The court was not only willing to continue the trial an extra day, but indeed indicated a preference to do so to avoid any pressures of rushing the proceedings. It is significant that the procedure followed on the last day was proposed by counsel, including Petitioner's, and not by the court.

Moreover, to accommodate counsel, the judge altered his usual trial schedule by starting earlier and adjourning later each day. The record demonstrates that Petitioner actually received the equivalent of four full days of trial.

The real basis of Petitioner's complaint is found in a strategy decision to conclude the case before the weekend. The essence of the Petition is stated at page 4: "Counsel for Petitioner knew it would be calamitous to the Petitioner for the jury to be dispersed for a three day weekend."

The Petitioner's determination in this regard was simply a matter of judgment which falls far short of raising a Constitutional issue. In fact, the jury had already been dispersed on three separate nights during the trial. It cannot be assumed that dispersion over the weekend would have any different effect, particularly in light of the court's constant admonition against dis-

cussion or consideration of the case beyond the courtroom. Nor can it be assumed that such dispersion would be more advantageous to one party than the other.

Strategy judgments occur throughout any jury proceeding. This Court does not serve to review such decisions presented in the guise of Constitutional questions.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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